Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

AMCLYDE ENGINEERED PRODUCTS COMPANY, INC., *et al.*,

Petitioners,

v.

TEXACO EXPLORATION AND PRODUCTION, INC., MARATHON OIL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the ultimate destination of marine cargo confer exclusive OCSLA jurisdiction over an accident that occurs in the middle of the Gulf of Mexico while one ocean-going vessel is transferring the cargo to another ocean-going vessel?

PARTIES TO THE PROCEEDING

Petitioners

The Petitioners in this case are AmClyde Engineered Products Company, Inc., AmClyde Products Company, Inc., and United Dominion Industries, Inc.

Respondents

The Respondents in this case are Texaco Exploration and Production, Inc., Marathon Oil Company, and Certain Underwriters at Lloyds Subscribing to Builder's Risk Policies S61125 and S611616.

STATEMENT PURSUANT TO RULE 29.6

United Dominion Industries, Inc. has been acquired by SPX Corporation. SPX Corporation does not have a parent company and FMR Corporation owns 18.3% of SPX. Additionally, Hotchkis and Wiley Capital, L.L.C. owns 10.6% of SPX.

Neither AmClyde Engineered Products Company, Inc. nor AmClyde Products Company, Inc. have a parent corporation nor does any publicly held corporation own 10% or more of those corporations' stock.

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OPINIONS BELOW

The opinion of the Court of Appeal (Appendix B) is reported at 453 F.3d 652. The final judgment of the district court, dated October 31, 2003 and transcript of the court referred to therein, dated March 27, 2003, are set forth at Appendices C and D, respectively. The orders and reasons of the district court, dated October 11, 2000, is set forth at Appendix E.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeal granting in part Underwriter's Petition for Panel Rehearing (Appendix A) was entered on June 23, 2006. This Petition for Writ of Certiorari is filed within 90 days of that date. This Court's jurisdiction is therefore invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Pertinent provisions of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356a, are set forth in the text of the petition.

STATEMENT OF THE CASE

This matter arises from an accident that occurred during the most traditional and common of maritime practices: the transfer of cargo from one vessel to another on the high seas. Immediately before the accident, a materials barge had transported an anticipated component of Texaco's Petronius

offshore drilling platform to a point approximately 1500 feet away from the platform. The platform itself was situated 100 miles off the coast of Alabama in the Gulf of Mexico. While the derrick barge (the DB-50) was transferring the component—the "South Deck Module" (SDM)—from the materials barge to the DB-50 for final transport to the platform, the crane on the DB-50 failed and dropped the SDM to the bottom of the Gulf. It is undisputed that at all time during the transfer and transport process, neither the SDM, the materials barge, nor the DB-50 was ever closer than 1500 feet to the Petronius platform.

Texaco's complaint invoked subject matter jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1356a, ("OCSLA"), but noted that substantive maritime law governed its claim. It alternatively asserted that "this Court has admiralty jurisdiction under 43 U.S.C. § 1333." The insurers, subrogated to Texaco's claims for property damage, invoked only admiralty jurisdiction under 43 U.S.C. § 1333. The district court determined that Texaco had not raised claims sufficient to sustain jurisdiction under OCSLA, concluding that the claims were cognizable solely under the court's admiralty jurisdiction.

The case went to trial in the Eastern District of Louisiana. After seven weeks (twenty-four trial days), the court took the case under advisement. Nearly four months later, the court issued an oral opinion that took over two hours to deliver and, that same day, issued a minute entry memorializing the court's findings. The court dismissed Texaco's claims against AmClyde, and found that Texaco "failed to sustain [its] burden of proof against all named defendants except . . . McDermott . . . relative to liability issues and, alternatively that . . . McDermott['s] negligence served as a super[s]eding

cause of the loss. . . ." The court also granted AmClyde's motion for judgment as a matter of law.

Texaco and Underwriters each appealed the judgment. Texaco contended that it was improperly denied a jury trial despite its invocation of OCSLA jurisdiction so as to proceed on the law side of admiralty. Texaco, again, acknowledged that both admiralty jurisdiction and maritime substantive law were present in the case. AmClyde argued that the district court's judgment should be affirmed because OCSLA did not provide jurisdiction over this case, and that, even if OCSLA did provide concurrent jurisdiction, no authority supported Texaco's contention that it was entitled to proceed on the "law side" of the court with a jury.

The Fifth Circuit's panel opinion found no basis for the exercise of admiralty jurisdiction, that OCSLA was the sole basis for the district court's jurisdiction, and that, consequently, Texaco should be allowed to try its claim to a jury (if allowed under the applicable state law under OCSLA). The outcome reached by the panel was never embraced nor advocated by any party, and runs contrary to the clear language of the law, the judicially determined intent of the law, prior decisions of this Court, and prior decisions of the Fifth Circuit. The court found that because the SDM was at the "development site" traditional maritime activity had been completed and therefore the SDM was merely being installed—not transported—despite being 1500 feet across open Gulf waters away from its intended destination. The only jurisdictional basis available, the panel concluded, was that provided by OCSLA. Given these findings, the court remanded to the matter to the district court.

Every party to the litigation, and there were many, recognized the admiralty nature of the claim. The only dispute at either the district court or appellate court level was whether OCSLA also applied and, if it did, the consequence of concurrent jurisdiction between it and admiralty. Rather than resolving those issues—issues that had been extensively briefed and argued by the parties—the panel sua sponte created new law. For unexplained reasons, the court of appeal chose to ignore even its own experience with these kinds of cases and created a new standard by which OCSLA jurisdiction will be conferred. No longer is physical contact with an OCSLA structure required, but only a presence within some nebulous area around or above areas somehow related to the cargo's ultimate destination. Not only was the most obvious basis for jurisdiction—admiralty—ignored and rejected, it was rejected in favor of a contorted and novel extension of OCSLA.

So novel was the decision of the court of appeals that the trial judge to whom the matter was remanded felt compelled to state, upon receipt of the remand,

> [w]e found, based on the entire record, that a maritime vessel's machinery and equipment malfunctioned while it was fulfilling a traditional maritime activity – transporting equipment to an offshore platform. The transporting mission did not end when the "lift" started; it ended after the vessel, its crew[,] and machinery caused the drop.

In concluding that OCSLA applied to the exclusion of admiralty jurisdiction and general maritime law, the Fifth Circuit unilaterally expanded the scope of OCSLA jurisdiction, displacing admiralty jurisdiction in the process.

Allowing the court of appeal's ruling to stand will have a lasting and detrimental effect on commerce at sea because parties entering into contracts for traditional maritime activities such as shipping or construction on navigable waters will now be subject to potentially conflicting state laws under OCSLA jurisdiction. Already, disinterested third parties writing on the court of appeal's decision have extensively criticized it with one opining that it "stands to cause substantial harm to admiralty jurisprudence."[1] Certiorari should be granted by this Court to overturn the decision because:

a) The prerequisites for the invocation of admiralty jurisdiction were present at the time of the accident;

b) The court of appeal's decision overextends OCSLA, which was intended to be narrowly applied;

c) The court of appeal's finding that OCSLA was the exclusive basis of subject-matter jurisdiction was contrary to previous holdings of this Court and the court of appeals, and must be corrected in order to eliminate confusion in the future.

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1. Michael A. Orlando, *OCSLA Trumps Admiralty Jurisdiction*, International Risk Management Institute, *at http://www.irmi.com/Expert/Articles/2006/Orlando08.aspx* (August 2006).

REASONS FOR GRANTING THE PETITION

I. DESPITE THE EXISTENCE OF EVERY REQUIREMENT FOR ADMIRALTY JURISDICTION, THE COURT OF APPEAL REJECTED ITS APPLICATION.

Admiralty jurisdiction applies when the incident occurs at a maritime situs (navigable waters) and has a connection to a traditional maritime activity. *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock, Co.*, 513 U.S. 527, 534 (1995). Historically, a sure sign of maritime activity is the involvement of a vessel.[2] It is of no moment that an appurtenance to a vessel, like a crane, is the focus of a case because "maritime law . . . ordinarily treats an 'appurtenance' . . . as part of the vessel itself." *Grubart*, 513 U.S. at 535.

The Court in *Grubart* created a two-part test to determine if there was a substantial relationship to traditional maritime activity. First, the court must "assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce." *Id.* at 534. Second, the court must determine "whether the general character of the activity giving rise to the incident shows a substantial relationship to maritime activity." *Id.*

In *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995), the court of appeals applied the *Grubart* test and found

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2. *See Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538 (5th Cir. 1986) and *Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 459 (5th Cir. 1992) (a "principal determinant" for the courts is "the relation the contract bears to the ship").

admiralty applied to an injury during maintenance service on a drilling rig. As to the initial-connection inquiry, the court noted that a disruptive impact on maritime commerce may result from delayed production, which is the very claim for damages in the present case. *Coats* at 1119. Second, the court noted that repair and maintenance of a drilling rig is a traditional maritime activity. *Id.* The court noted that "this tort occurred on a vessel on navigable waters. Providing compensation for shipboard injuries is a traditional function of admiralty laws." *Id. citing Sissions v. Ruby*, 497 U.S. 358, 368-75 (1990).

The court of appeal ignored these principles, the involvement of vessels transporting cargo on the high seas, and the vessels' remoteness from the platform. In short, it made no attempt to apply the *Grubart* analysis to the instant case. Instead, it found exclusive OCSLA jurisdiction by judicially creating a "development site" extension contrary to OCSLA's limited jurisdictional reach. The DB-50 was a vessel upon navigable waters. The activities that it was conducting were not only "potentially disruptive" to maritime commerce, they were disruptive in fact. And they also had a substantial relationship to maritime activity. Admiralty jurisdiction was conceived to apply to precisely these kinds of activities.

II. THE PANEL'S DECISION OVEREXTENDS OCSLA, WHICH WAS CREATED TO BE NARROWLY APPLIED.

The limited reach of OCSLA was explained in this Court's examination of the legislative history of the act. In *Rodriquez v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), this Court found that "the purpose of [OCSLA] was

to define a body of law applicable to the seabed, the subsoil[,] and the fixed structures on the Outer Continental Shelf." *Rodriquez* at 355. Not mentioned by the Court are the waters above the seabed and subsoil or the waters surrounding these fixed structures. This was because laws already existed to govern these areas.

In previous litigation between many of the same parties now before the Court, and under eerily-similar circumstances, both this Court and the court of appeal easily concluded what is plain: that these claims fall under the admiralty jurisdiction of the court. In *McDermott v. AmClyde*, 511 U.S. 202 (1994), the lower court considered an allegation that a defective crane dropped a platform during an attempt to move it from a barge to a structural steel base. The Fifth Circuit readily concluded that admiralty jurisdiction applied. And when the suit ended up before this Court, a unanimous Court stated the obvious: "[a] construction accident in the Gulf of Mexico gave rise to this admiralty case." *Id.* at 204. That conclusion is no less obvious here. There was no discussion by the either the Fifth Circuit or this Court of an OCSLA "development site" ousting admiralty jurisdiction.

Unless a maritime casualty has some physical connection with the seabed, the subsoil, or the fixed structures on the Outer Continental Shelf, OCSLA does not apply to that loss. The Fifth Circuit has stated that OCSLA was "enacted for the purpose, primarily, of asserting ownership of and jurisdiction over the minerals in and under the Continental Shelf." *Guess v. Read*, 290 F.2d 622 (5th Cir. 1961). That OCSLA is limited in its jurisdictional reach is a proposition routinely embraced by both state and federal courts. As the

court in *Employers Mutual Casualty Company v. Samuels*, 407 S.W.2d 839, 843 (Tex.Civ.App. 1966) explained,

> While the language of the Outer Continental Shelf Lands Act expressly amounts to an assertion of jurisdiction, the words make manifest that federal jurisdiction and control are extended *only* to the subsoil and seabed of the shelf, and to all artificial islands and fixed structures which may be erected thereon.[3]

OCSLA itself makes plain its limited nature: "It is hereby declared to be the policy of the United States that this subchapter shall be construed in such a manner that the character of the waters above the Outer Continental Shelf as high sea and the right to navigation and fishing therein shall not be affected." 43 U.S.C. § 1332(2). Previous decisions of the Fifth Circuit and the clear language of the statute indicates that OCSLA was never intended to be extended in the manner adopted by the court of appeal.

It is undisputed that the DB-50 was an ocean-going, self-propelled vessel that was operating on navigable waters. The materials barge was, likewise, an ocean-going vessel on the high seas. Neither of the two vessels was in contact with the platform, the seabed, or the subsoil mentioned specifically by the statute. Never before, given these facts, has any court found that OCSLA jurisdiction was present, and certainly not at the expense of admiralty jurisdiction.

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3. *See also Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 339 (5th Cir. 1978) ("We believe that a limited construction of the Act comports with the primary purpose of resolving competing claims to ownership of the natural resources of the offshore seabed and subsoil.")

In reaching its decision the court erroneously characterized the DB-50 in a manner that it temporarily ceased existing as a vessel transporting cargo and, in essence, had become part of the "offshore construction site." The court found that "the undisputed facts demonstrate that traditional maritime transportation was complete at the time of loss" and the SDM was "already at the development site and was merely being moved by crane from the materials barge into its place on the fixed compliant tower, rather than being transported point-to-point across the sea."[4] None of these issues were raised in the previous *McDermott* case because without some connection to the seabed, subsoil, or some offshore structure, it was inconceivable that OCSLA would apply.

The court of appeals left unanswered how far out into navigable waters a "development site" might extend. Though holding that OCSLA alone conferred jurisdiction, the court of appeals made no finding that the DB-50 or the materials barge had any contact with any area covered by OCSLA. The panel ignores the undisputed fact that when the SDM fell, the vessels were at least 1500 feet from the Petronius platform. Accepting this judicially created "development site"

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4. The unworkable nature of the court of appeal's ruling is reflected by the very language it uses to describe the facts of the case in its Opinion. When discussing the North Deck Module the Court stated, "First, McDermott *transported* the heavier of the two, the North Deck Module, some 1500 feet from it storage location." (*See* 448 F.3d 760, 766 (5th Cir. 2006), emphasis added). However, two sentences later when discussing the SDM, which at the time of the accident was at the same transport site as the NDM or some 1500 feet away from the platform, the Court states, "McDermott then began *installation* of the South Deck Module." (*See id.*, emphasis added).

extension to OCSLA jurisdiction creates immediate uncertainty in future cases: How far out does the "development site" extend? If the only criterion is the final destination, then does OCSLA control from the moment a vessel with cargo destined for a fixed platform leaves port? Can a "development site" be two miles away from an OCSLA-covered structure? Ten miles? Fifty miles?

III. THE COURT OF APPEAL'S FINDING THAT OCSLA APPLIED SOLELY IS CONTRARY TO THE PREVIOUS HOLDINGS OF THIS COURT AND THE FIFTH CIRCUIT, AND MUST BE CORRECTED IN ORDER TO ELIMINATE CONFUSION IN THE FUTURE.

The Fifth Circuit's decision is directly contrary to both the decisions of this Court and to its own established jurisprudence.

In *Offshore Logistic, Inc. v. Tallentire,* 477 U.S. 207 (1986), this Court found admiralty jurisdiction was proper when two oil-platform workers were killed in a helicopter accident while being transported home from the platform. In rejecting OCSLA as a jurisdictional basis, this Court stated that it was Congress's intent to determine the scope of OCSLA by locale and not the status of the individuals injured or killed. *Offshore Logistics,* at 219. More appropriately to this case, the Court specifically rejected the kind of jurisdictional "extension" embraced by the court of appeal:

> The extension of the OCSLA far beyond its intended locale to the accident in this case simply cannot be reconciled with either the narrowly circumscribed area defined by the statute or the

> statutory prescription that the Act not be construed to affect the high seas which cover the Continental Shelf.

Id. The Fifth Circuit's utilization of a "development site" extension to OCSLA is in direct conflict with this Court's holding in *Offshore Logistics*. If the court of appeal's creation is left standing, the jurisdictional reach of OCSLA can now be seen as some ambiguous area that requires no physical contact to any area specifically covered in the statute.

The Fifth Circuit's decision also runs against its own well-established jurisprudence. In *Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa*, 761 F.2d 229 (5th Cir. 1985) the court found that admiralty jurisdiction applied when the legs of a jack-up rig collided with a pipeline on the ocean floor. The pipeline in question was clearly covered by OCSLA.[5] Nonetheless, using the Admiralty Extension Act, the court stated that admiralty jurisdiction extended to "all cases of damage to property caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." *Id.* at 233.

The court of appeal's jurisdictional analysis in this case simply cannot be reconciled with this decision. In *Marathon*, the conditions for exclusive OCSLA jurisdiction were much more compelling than in the current case, yet admiralty jurisdiction was found to apply: the vessel actually came in contact with a structure specifically covered by OCSLA.

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5. *See Marathon*, 761 U.S. at 233 ("Marathon's pipeline, a fixed structure on the seabed."); *Marathon*, 761 U.S. at 234 ("The hydrocouple malfunction occurred on a fixed structure (a pipeline lying on the Outer Continental Shelf.")).

However, the appellate court found admiralty jurisdiction because the requirements for it were present. Nonetheless, in the case at bar, despite there being no physical contact with any entity or fixture covered by OCSLA, the panel has ignored its own precedent and erroneously extended the scope of OCSLA jurisdiction.

Another claim that arose in *Marathon* illustrates the limited reach of OCSLA. Hydrocouples that were placed on the pipeline to repair it were found to be defective. In holding that OCSLA covered the products liability portion of this claim, the Fifth Circuit stated:

> Accidents occurring on fixed structures on the Outer Continental Shelf have consistently been held subject to the [OCSLA] and governed by the civil laws of the adjacent state. Similarly, damage occurring to the fixed structure itself, when not caused by a colliding vessel, is governed by the Act.

Marathon at 234. The Fifth Circuit acknowledged the preference for general maritime law (substantive) over state law through OCSLA in situations involving a vessel on the high seas. This corresponds with the language and intent of OCSLA: to fill in those legal areas unique to the development of resources on the OCS where traditional maritime law does not already provide adequate guidance.

In reaching its present decision, the Fifth Circuit erroneously relied on *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985). *Laredo* is distinguishable from the current situation. The *Laredo* case principally revolved around non-payment on a contract for

the construction of a platform on the Outer Continental Shelf. There was no traditional maritime activity or maritime situs in question in the case. The dispute did not revolve around an accident involving a vessel on the high seas, but rather the failure of the defendant to comply with the contract. While the court did find that OCSLA conferred jurisdiction, it also found that when admiralty and OCSLA jurisdiction overlap, the case is governed by maritime law. *Id.* at 1229. The reason for OCSLA applying in *Laredo* was that none of the criteria were met for admiralty jurisdiction. In this instance, all parties agreed that the actions that gave rise to the claims were maritime in nature because the activity was in fact maritime: transferring cargo from one vessel to another to continue the transport of the cargo.

CONCLUSION

The panel's finding that OCSLA jurisdiction applied exclusively runs against the clear language of the statute, the intent of the law, and previous judicial decisions on the subject of this Court and the court of appeal. Additionally, the decision of the appellate court has created irreconcilable confusion in determining the proper basis of subject-matter jurisdiction in future cases, and the inevitable waste of judicial resources that attends such confusion. This Court should grant the petition, reverse the decision of the court of appeal, and reinstate the judgment of the district court because it was appropriately tried without a jury.

Respectfully submitted,

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APPENDIX

APPENDIX A — PARTIAL GRANT AND DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JUNE 23, 2006

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 03-31208

TEXACO EXPLORATION AND PRODUCTION, INC.; MARATHON OIL COMPANY,

Plaintiffs-Appellants,

VERSUS

AMCLYDE ENGINEERED PRODUCTS COMPANY, INC.; ET AL.,

Defendants,

AMCLYDE ENGINEERED PRODUCTS COMPANY, INC.; UNITED DOMINION INDUSTRIES, INC., formerly known as AMCA INTERNATIONAL CORP., formerly known as CLYDE DIVISION,

Defendants-Appellees.

Appendix A

CERTAIN UNDERWRITERS AT LLOYDS LONDON, Each for its own self and not one for the other, jointly and not severally and each subscribing to Policy No. S611625 and each for its own self and not one for the other, jointly and not severally and each subscribed to Policy No. S611626; ET AL.,

Plaintiffs-Appellants,

VERSUS

AMCLYDE ENGINEERED PRODUCTS, INC.; ET AL.,

Defendants,

AMCLYDE ENGINEERED PRODUCTS, INC.; AMCLYDE ENGINEERED PRODUCTS COMPANY, INC.; UNITED DOMINION INDUSTRIES INC., formerly known as AMCA INTERNATIONAL CORP., formerly known as CLYDE DIVISION; J RAY MCDERMOTT INTERNATIONAL VESSELS, LTD.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana

ON PETITION FOR PANEL REHEARING

Before JONES, Chief Judge, and JOLLY and DeMOSS, Circuit Judges.

Appendix A

PER CURIAM:

IT IS ORDERED that the petition for panel rehearing is GRANTED for the limited purpose of amending the text in the panel opinion issued on May 5, 2006. In the section of the panel opinion entitled "Conclusion," the following text is added as footnote 16 at the conclusion of the final sentence of the third paragraph,

> Texaco amended its complaint to add as a defendant United Dominion Industries, Inc., a party also named as an AmClyde-related entity defendant in Underwriters' subrogation action. The district court concluded that United Dominion was not an "other assured," and accordingly Underwriters' subrogation claim proceeded against United Dominion. That claim and other attendant issues are not properly before us, and this opinion should not be construed as addressing such issues. However, because we remanded Texaco's products liability claims, we similarly grant Underwriters' request for remand of its subrogation claims against United Dominion. On remand, nothing in this opinion precludes Underwriters from requesting proper allocation of United Dominion's uninsured defense costs in connection with these claims.

The foregoing amendment does not affect a substantive change in the judgment of the Court contemplated by the original panel opinion issued on May 5, 2006. Upon the filing of this order, the mandate on the original panel opinion as amended by this order SHALL ISSUE.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 5, 2006

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 03-31208

TEXACO EXPLORATION AND PRODUCTION, INC.; MARATHON OIL COMPANY,

Plaintiffs-Appellants,

VERSUS

AMCLYDE ENGINEERED PRODUCTS COMPANY, INC.; ET AL.,

Defendants,

AMCLYDE ENGINEERED PRODUCTS COMPANY, INC.; UNITED DOMINION INDUSTRIES, INC., formerly known as AMCA INTERNATIONAL CORP., formerly known as CLYDE DIVISION,

Defendants-Appellees.

Appendix B

CERTAIN UNDERWRITERS AT LLOYDS LONDON, Each for its own self and not one for the other, jointly and not severally and each subscribing to Policy No. S611625 and each for its own self and not one for the other, jointly and not severally and each subscribed to Policy No. S611626; ET AL.,

Plaintiffs-Appellants,

VERSUS

AMCLYDE ENGINEERED PRODUCTS, INC.; ET AL.,

Defendants,

AMCLYDE ENGINEERED PRODUCTS, INC.; AMCLYDE ENGINEERED PRODUCTS COMPANY, INC.; UNITED DOMINION INDUSTRIES INC., formerly known as AMCA INTERNATIONAL CORP., formerly known as CLYDE DIVISION; J RAY MCDERMOTT INTERNATIONAL VESSELS, LTD.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana

(99-CV-3623)

Before JONES, Chief Judge, and JOLLY and DeMOSS, Circuit Judges.

Appendix B

DeMOSS, Circuit Judge:

This appeal arises out of an accident during the construction of the Petronius oil and gas production facility in the Gulf of Mexico. Addressing multiple issues raised in two actions consolidated for trial and appeal, we affirm in part, reverse in part, and remand for further proceedings. With respect to the products liability action arising from the loss of a portion of the Petronius compliant tower, we conclude that the district court erred in determining its subject matter jurisdiction and the applicable substantive law; and we reverse and remand. With respect to the insurance subrogation action and the attendant interpretation of the applicable insurance policy, we affirm the district court's grant of summary judgment based upon parties' entitlement to waiver of subrogation and affirm the dismissal of the subrogation claims. We also affirm the court's award of costs to AmClyde.

FACTUAL BACKGROUND

The two actions consolidated for trial and appeal, which for simplicity's sake we style the Texaco products liability action (or the "Texaco cause") and the Underwriters subrogation action (or the "Underwriters cause"), are presented separately. Though no party raises an objection to the consolidation, we treat the actions separately here for clarity to the parties and to the district court on remand.

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I. Facts Leading to Texaco's Products Liability Action

Plaintiffs-Appellants Texaco Exploration and Production, Inc. and Marathon Oil Company (collectively, "Texaco") are the lessees of an offshore federal lease at Viosca Knoll Block 786 on the Outer Continental Shelf (or the "Shelf"). The lease block is located in approximately 1750 feet of water and is the site of Texaco's oil and gas development project, Petronius. The Petronius project was a $400 million deepwater drilling and production project for the development of 80 to 100 million barrels of oil equivalent. The compliant tower, the construction of which forms the basis of this dispute, is a platform, designed to flex with the forces of wave, wind, and current, that is fixed permanently to the Outer Continental Shelf. The Petronius compliant tower is approximately 1870 feet in height, weighs approximately 43,000 tons, and is capable of producing 60,000 barrels of oil and 100 million cubic feet of natural gas per day. *See Texaco and Marathon Move Forward on $400 Million Deepwater Project in Gulf of Mexico Compliant Tower Design Selected for "Petronius,"* BUSINESS WIRE, Sept. 17, 1996, *available at* LEXIS, News Library, BWire file.

During the 1998 construction of the Petronius compliant tower, a main load line on a crane, which was mounted on the Derrick Barge 50 ("DB-50"), failed. The crane or load line failure caused the deck section that was then suspended (the "South Deck Module") to fall into the Gulf of Mexico on the Outer Continental Shelf off the coast of Alabama and Louisiana. The failure resulted in a complete loss of the South Deck Module and a fifteen-month delay to the construction project of the Petronius compliant tower affixed to the sea floor.

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Prior to the initiation of construction, Texaco contracted with J. Ray McDermott, Inc. ("McDermott"). The contract charged McDermott with the engineering design, drafting, fabrication, installation, and construction of the Petronius compliant tower platform and its components, including the foundation piles, tower, support frame, two deck modules (the North Deck Module and the South Deck Module), and attendant drilling rigs at Viosca Knoll Block 786. The construction project proceeded in two phases using the DB-50 barge, which McDermott chartered and operated.[1] The DB-50 was owned by J. Ray McDermott International Vessels, Ltd. ("JRMIV").[2] The crane mounted to the DB-50 was manufactured by the predecessor to Defendant-Appellee AmClyde Engineered Products, Inc.

Once construction of the compliant tower commenced, both the North and South Deck Modules (which were prefabricated off-site) were transported to the offshore construction site on the same material barge. On December 3, 1998, McDermott began installation of both modules onto the already-constructed support frame of the Petronius compliant tower. First, McDermott transported the heavier of the two, the North Deck Module, some 1500 feet from its storage location on the material barge to the support frame and installed it. McDermott then began installation of the South Deck Module. Between the initial lift of the South

1. Texaco and McDermott's construction contract called for McDermott's provision of the DB-50 or another suitable vessel.

2. The parties make much of the quality and degree of distinction between JRMIV and McDermott. The entities are at a minimum affiliates, and we address this issue in greater detail with respect to the discussion of Underwriters' appeal.

Deck Module from the material barge and its placement on the support frame, the crane's wire rope load line failed, dropping the South Deck Module to the sea floor.

II. Facts Leading to Underwriters' Subrogation Action

Builder's Risk Underwriters (the "Underwriters") insured the Petronius compliant tower construction project, including the lost South Deck Module. The Builder's Risk Policy comprises a general conditions section, a section that covers physical damage, and a section that covers third party legal and contractual liabilities. Texaco was a principal, named assured under the policy.

Under the terms of the policy, Underwriters paid Texaco more than $72 million for covered losses, including the loss of the South Deck Module. Not included, however, in the policy's coverage were the losses due to delayed production.[3]

PROCEDURAL BACKGROUND

On December 2, 1999, Texaco sued, among others, AmClyde Engineered Products Company, Inc. ("AmClyde") and Friede Goldman Halter, Inc., successors to the designer and manufacturer of the Clyde Whirley 4000 Model 80 crane, in federal court, invoking federal question jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA" or the "Act"), 43 U.S.C. § 1331, and admiralty jurisdiction in the alternative. Texaco alleged multiple negligence and products

3. Losses due to delay are expressly excluded from coverage under section one of the policy, which covers property damage. Builder's Risk Policy, at 14, ¶ 10(1)(c).

liability causes of action, and alleged that the case should be governed by general admiralty law.[4] Texaco did not sue McDermott because their contract contained a binding arbitration clause.

In a separate action, Underwriters sued, among others, AmClyde, JRMIV, and the DB-50 *in rem*, seeking subrogation for amounts already paid to Texaco under the terms of the Builder's Risk Policy issued to Texaco as the principal assured, invoking admiralty jurisdiction under 28 U.S.C. § 1333. Underwriters did not sue McDermott because McDermott was a named additional assured under the Builder's Risk Policy with Texaco. The two actions, Texaco's products liability action and Underwriters' subrogation action, were consolidated on Underwriters' motion.

The defendants in Texaco's suit tendered McDermott as a third-party defendant pursuant to Federal Rule of Civil Procedure 14(c), and McDermott filed a summary judgment motion on the Rule 14(c) tendered claims. Texaco moved to stay all proceedings between itself and McDermott pending arbitration. The district court denied the stay and granted McDermott summary judgment. Texaco appealed the interlocutory order under 9 U.S.C. § 16(a)(1)(A). *See Texaco v. AmClyde*, 243 F.3d 906 (5th Cir. 2001) ("*Texaco I*"). On appeal, a panel of this Court reversed, staying litigation

4. Texaco alleged in part: (1) AmClyde's crane design was defective, rendering the crane unreasonably dangerous; (2) AmClyde failed to furnish McDermott with sufficient information regarding functioning limitations on the crane; and (3) AmClyde negligently maintained and inspected the crane.

between Texaco and McDermott and vacating the summary judgment for McDermott. *Id.* at 912. The panel declined to create an exception to the Federal Arbitration Act, 9 U.S.C. § 3, to permit a third party, AmClyde, to nullify an arbitration clause that did not conflict with Rule 14(c). The panel remanded with instructions that a limited stay be entered between Texaco and McDermott and that Texaco's claims against other defendants proceed.[5] The *Texaco I* panel did not address the issues raised in the instant appeal.

On remand, the district court granted by written order dated October 13, 2000 a motion to strike Texaco's jury demand, noting that admiralty law's application extinguished the jury trial right. In that order, the district court determined that no fact or allegation permitted the exercise of OCSLA jurisdiction because admiralty law alone governed and did not give rise to a jury trial right. On Underwriters' subrogation claim, the district court granted summary judgment to AmClyde on the grounds that it was an additional insured under the Builder's Risk Policy, entitled to waiver of subrogation. The court granted AmClyde defense costs under that same policy.

The case proceeded to bench trial on Texaco's products liability claim for twenty-four days. The district court issued its liability findings in an oral opinion and entered a written order of judgment. The court found that Texaco had failed to sustain its burden of proof with respect to liability against all defendants except McDermott. The court concluded that JRMIV was liable to Texaco and Underwriters for

5. Texaco and McDermott subsequently submitted to arbitration and resolved their dispute.

unseaworthiness of the DB-50 because of the crane load line's failure and in the alternative, that McDermott's negligence in caring for and inspecting the wire rope was a superseding cause.

JRMIV moved to dismiss Underwriters' subrogation action based upon the policy language and to vacate the court's earlier finding that JRMIV was partially liable to Texaco for the loss of the South Deck Module. The district court subsequently vacated its liability findings and entered summary judgment for JRMIV on the ground that JRMIV was an additional insured entitled to a waiver of subrogation or, alternatively, that McDermott, as a bareboat charter, was solely responsible for the condition, maintenance, and operation of the DB-50 at all pertinent times, precluding liability against JRMIV for unseaworthiness.

DISCUSSION

Texaco and Underwriters separately appeal, arguing that the district court erred in multiple rulings. We hold the district court erred in determining it lacked jurisdiction under OCSLA. In light of that fundamental error, the court erred in applying substantive maritime law and in denying Texaco's demand for a jury trial. Based upon these errors, and because the denial of jury trial was not harmless error, we must vacate the district court's judgment for AmClyde and remand for further proceedings. With respect to the district court's summary judgment disposition of issues related to Underwriters' subrogation claims, we affirm.

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I. Texaco's Appeal

Texaco argues that the district court reversibly erred in granting the motion to strike Texaco's jury demand based upon the court's incorrect determination of its subject matter jurisdiction. According to Texaco, jurisdiction was properly grounded on OCSLA – which provides federal courts with jurisdiction over disputes arising from the development of minerals on the Outer Continental Shelf – in addition to the admiralty jurisdiction that the district court recognized, and Texaco further contends that these overlapping admiralty and OCSLA jurisdictions result in the application of substantive maritime law and also give rise to a jury trial right that the district court improperly denied.

A. Subject Matter Jurisdiction

1. OCSLA Jurisdiction Was Properly Invoked

The relevant portion of OCSLA's jurisdictional grant provides,

> (b)(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals. . . .

43 U.S.C. § 1349(b)(1)(A).

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The Act expressly grants subject matter jurisdiction to the federal courts over cases and controversies "arising out of or in connection with" any operation involving the "development" of minerals on the Outer Continental Shelf. *Id.* "Development" is defined by OCSLA as "those activities which take place following discovery of minerals in paying quantities, including geophysical activity, drilling, *platform construction*, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered." § 1331(l) (emphasis added). Thus, the Act provides for federal subject matter jurisdiction over cases and controversies arising out of or in connection with any operation involving platform construction on the Outer Continental Shelf. *Id.*; § 1349(b)(1). Such federal question jurisdiction under OCSLA is, by virtue of its express statutory provision, independent of any additional maritime basis for federal jurisdiction. *See* U.S. CONST. Art. III, § 2; 28 U.S.C. § 1333.

We have recognized that OCSLA's jurisdictional grant is broad, *Tenn. Gas Pipeline v. Houston Cas. Co.*, 87 F.3d 150, 154 (5th Cir. 1996), and that the Act covers "a wide range of activity occurring beyond the territorial waters of the states on the outer continental shelf of the United States," *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 495 (5th Cir. 2002). Continental shelf platform construction, such as the construction of the Petronius compliant tower giving rise to this action, is explicitly included within the OCSLA definition of "development." 43 U.S.C. § 1331(l); *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1226-27 (5th Cir. 1987) (explaining that both the plain text and legislative history of OCSLA support federal jurisdiction

over actions arising from development, in the form of platform construction, on the Outer Continental Shelf).

AmClyde counters that this controversy arises, instead, out of the traditional maritime conduct of transporting goods across navigable waters, which is beyond the reach of OCSLA. The district court concluded that Texaco's claims fall exclusively under the district court's admiralty jurisdiction and cannot, also or in the alternative, be grounded upon OCSLA's jurisdictional grant in § 1349(b)(1). The court determined that admiralty law exclusively applied, extinguishing a jury trial right. Citing *Baris v. Supicio Lines, Inc.*, 932 F.2d 1540, 1547 (5th Cir. 1991), and *Laredo*, 754 F.2d at 1229, the court concluded that admiralty law alone served as a basis for jurisdiction because its situs and nexus tests were satisfied and because the court rejected Texaco's invocation of the savings to suitors clause of 28 U.S.C. § 1333.

We agree with Texaco that the underlying facts and the nature of the torts alleged bring its cause of action within OCSLA's provisions for federal subject matter jurisdiction. *See* 43 U.S.C. § 1349(b)(1). At the time of the loss of the South Deck Module, the parties were undeniably involved in the development of the Outer Continental Shelf, as defined by the Act. The complaint pleads that on December 3, 1998, McDermott "was lifting the Petronius south deck module at a location on the Outer Continental Shelf adjacent to the Petronius compliant tower structure" when the load line failed, dropping the module into the sea and causing a total loss of the module, damages related to reconstruction, and delay to the platform construction and mineral development.

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Contrary to AmClyde's characterization on appeal, the undisputed facts demonstrate that traditional maritime transportation was complete at the time of the loss. The DB-50 was in position, had already installed the North Deck Module, and was lifting – not transporting – the South Deck Module into position for installation. In submissions to the district court, AmClyde characterized the accident as occurring while McDermott lifted the deck module into place after having "successfully placed the north deck module," and in its Answer and Cross-Complaint, AmClyde referred repeatedly to the conduct at the time of the accident as "the Petronius module lift." The parties' own characterization of the events surrounding the loss of the South Deck Module reveals that Texaco's cause arises out of and in connection with the development of the Outer Continental Shelf. *See* § 1349(b)(1).

In *Recar v. CNG Producing Co.*, 853 F.2d 367, 369 (5th Cir. 1988), we held that OCSLA granted the district court subject matter jurisdiction over a plaintiff's claim that he was injured, while suspended and swinging from a fixed platform to a nearby vessel, when the rope that carried him broke. *Id.* at 368-69. OCSLA's jurisdiction extended to Recar's claim because his injury, "that occurred while he was overseeing the repair and maintenance of the platform, [arose] out of the production of minerals on the Outer Continental Shelf" and would not have occurred but for his maintenance of the platform. *Id.* at 369. Similarly, here, the harm alleged by Texaco arises directly from the construction of the Petronius compliant tower, a fixed platform expressly covered by OCSLA's terms, and would not have occurred but for the development of the Outer Continental Shelf in the form of the Petronius compliant tower's construction.

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As stated earlier, this Circuit has consistently read OCSLA's jurisdictional grant broadly. *See Tenn. Gas Pipeline*, 87 F.3d at 156; *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994); *Recar*, 853 F.2d at 369. AmClyde's argument to the contrary is not availing. OCSLA's broad grant of jurisdiction to the federal courts over cases arising out of the development of the seabed is not curtailed simply because the South Deck Module was in motion at the time of the crane or wire rope's failure. The deck module was already at the development site and was merely being moved by crane from the materials barge into its place on the fixed compliant tower, rather than being transported point-to-point across the sea. The crane load line failure occurred during the construction of the compliant tower, after the successful installation of the North Deck Module. Texaco properly pled that the court exercised jurisdiction under OCSLA.

Our jurisdictional analysis does not conclude here, however, because Texaco also appeals the final judgment resulting from the court's application of substantive maritime law to the claims it deemed arose out of admiralty jurisdiction. In *Recar*, we expressly declined to address whether admiralty, in addition to OCSLA, provided a basis for the court's subject matter jurisdiction. 853 F.2d at 370 (noting the possibility that "the relationship of the alleged 'wrong' . . . to traditional maritime activity is sufficiently strong to characterize the wrong as a maritime tort which requires application of general maritime law"). We must resolve whether two bases for jurisdiction overlap or whether OCSLA alone grants subject matter jurisdiction.

2. Admiralty Jurisdiction Was Not Properly Invoked

Texaco's complaint reveals that the alleged torts do not give rise to admiralty jurisdiction. In the first instance, Texaco invoked the court's OCSLA jurisdiction: "This Court has subject matter jurisdiction under [OCSLA]. The facts underlying the claim require the application of substantive general maritime law." In the alternative, Texaco averred that the court enjoyed admiralty jurisdiction over the claims. *See* 28 U.S.C. § 1333. In light of these mixed allegations of federal court jurisdiction, Texaco complained of (1) defective and unreasonably dangerous products design, including design of the crane's equalizer system, triggering strict liability; (2) negligent failure to furnish sufficient information regarding operating limitations to the barge's owner; (3) negligent failure to maintain, inspect and/or remedy the crane's defects; (4) negligent failure to alert Texaco to a known danger with respect to the crane; (5) negligent failure to prevent the construction project from proceeding with knowledge of the crane's defects; (6) defective and unreasonably dangerous condition of the wire rope that was furnished with improper, defective, or inadequate lubrication, making it unreasonably susceptible to corrosion; (7) negligent provision of unmatching port and starboard load lines; and (8) negligent failure to detect deficiencies of the crane and wire rope during a test lift and inspection or a failure to warn if the deficiencies were detected.

Admiralty jurisdiction is determined by a two part test of (1) location and (2) connection with maritime activity. *Sisson v. Ruby*, 497 U.S. 358, 363 (1990). The location test is easily satisfied as the parties agree that the products liability

and negligence torts alleged here occurred on navigable water. Therefore, our analysis must focus upon the connection test, which is less easily resolved on this record and which comprises two queries: (1) whether the type of incident involved has the potential to disrupt maritime commerce and (2) "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995); *Scarborough v. Clemco Indus.*, 391 F.3d 660, 663 (5th Cir. 2004).

Texaco's causes of action, which we have concluded are inextricably connected with the development of the Outer Continental Shelf and an installation for production of resources there, *see* 43 U.S.C. § 1333(a)(1), are insufficiently connected to traditional maritime activity to support the application of admiralty law. In *Grubart*, the connection to maritime activity was sufficient to trigger admiralty jurisdiction because the incident was of a type potentially disruptive to maritime commerce and the general character of the activity was "substantially related to traditional maritime activity." *Grubart*, 513 U.S. at 538, 540. The complaint there alleged negligent weakening of a tunnel structure located underneath the riverbed, into which the defendant had contracted to install pilings. *Id.* at 529. The resultant connection to maritime activity was sufficient because the incident resulted from "damage by a vessel in navigable water to an underwater structure." *Id.* at 539. The general character of the activity was maritime in nature because the work giving rise to the claim was "repair or maintenance work on a navigable waterway performed from a vessel." *Id.* at 540.

The distinction between *Grubart* and the instant suit hinges upon the core factors relevant to the determination of maritime law's application. In *Grubart*, the damage was inextricably tied to the navigable waterway: the transportation and use of materials on water were directly connected to the repair and maintenance of a navigable waterway. *Id.* Texaco's complaint, on the other hand, arises not from traditionally maritime activities but from the development of the resources of the Outer Continental Shelf, and Texaco's complaint would not exist but for the construction of the Petronius compliant tower, an activity undeniably covered by OCSLA. To the extent that maritime activities surround the construction work underlying the complaint, any connection to maritime law is eclipsed by the construction's connection to the development of the Outer Continental Shelf.

Therefore, the district court erred in determining the basis for its subject matter jurisdiction. The district court on remand exercises its jurisdiction granted by OCSLA, not admiralty jurisdiction.

B. OCSLA's Choice of Law Provision Determines Applicable Law

Concluding that jurisdiction rested solely upon OCSLA, we now turn to the district court's denial of jury trial. Texaco argues that OCSLA's choice of law provision, *see* 43 U.S.C. § 1333, is not in dispute;[6] however, we must determine the

6. Indeed, we agree with Texaco that in determining whether OCSLA grants subject matter jurisdiction, the statute's choice of law provision is not at issue. But here, Texaco also challenges the denial of jury trial and, relatedly, the district court's judgment for AmClyde. This second challenge requires review of the district court's application of maritime law to Texaco's claims against AmClyde.

applicable substantive law in order to address whether the denial of jury trial was reversible error. According to Texaco, its complaint combines a maritime claim with a non-maritime basis for jurisdiction and this combination creates a Seventh Amendment right to jury trial, the denial of which was reversible error. According to AmClyde's alternative position,[7] in the event of overlapping jurisdiction — grounded upon both OCSLA and admiralty — substantive maritime law applies and prevents a right to jury trial. We disagree with both parties' positions. As we explain next, OCSLA does not permit the application of substantive maritime law to Texaco's action.

Both parties merely assume that maritime law controls this defective product design and negligence action, citing only dicta for the proposition that where OCSLA and admiralty jurisdiction overlap, maritime law applies. *See Laredo*, 754 F.2d at 1229.[8] Our caselaw has not squarely resolved whether maritime law applies of its own force to a

7. We have rejected AmClyde's primary argument that the sole basis for subject matter jurisdiction is admiralty.

8. The parties' conclusion that maritime law applies to the merits of the claim likely stems from the Contract for Engineering, Fabrication and Installation that contains a choice of law provision, identifying the General Maritime Law of the United States as the applicable law. As we explain, under OCSLA, the Contract's choice of law provision is of no moment because the parties' choice of law will not trump the choice of laws scheme provided by Congress in OCSLA. *See Gulf Offshore Co. v. Mobil Oil* Corp., 453 U.S. 473, 485 (1981); *Union Tex. Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043, 1050 (5th Cir.), *cert. denied*, 498 U.S. 848 (1990); *Matte v. Zapata Offshore Co.*, 784 F.2d 628, 631 (5th Cir. 1986). Moreover, AmClyde was not a party to the Contract for Engineering, Fabrication and Installation.

products liability tort occurring during and as a result of the construction of a fixed compliant tower on the Outer Continental Shelf. We may not rely upon the parties' bare conclusion that substantive maritime law applies because OCSLA provides its own choice of law rules.

OCSLA extends federal law to the Outer Continental Shelf and borrows adjacent state law as a gap-filler. 43 U.S.C. § 1333. "To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations . . . the civil and criminal laws of each adjacent State . . . are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." § 1333(a)(2)(A).

> [OCSLA] proclaims that [fixed platforms on the Outer Continental shelf] are federal enclaves and any dispute arising on them is to be resolved by resort to the laws of the adjacent state which, 'to the extent that they are applicable and not inconsistent with [OCSLA] or with other Federal laws and regulations . . . are . . . declared to be the law of the United States. . . .' 43 U.S.C. § 1333(a)(2)(A).

Matte v. Zapata Offshore Co., 784 F.2d 628, 630 (5th Cir. 1986).

These statutory choice of law rules are not subject to exception by the parties' agreement. *Gulf Offshore Co. v. Mobil Oil* Corp., 453 U.S. 473, 485 (1981); *Union Tex.*

Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1050 (5th Cir.), *cert. denied*, 498 U.S. 848 (1990) (finding "beyond any doubt that OCSLA is itself a Congressionally mandated choice of law provision requiring that the substantive law of the adjacent state is to apply even in the presence of a choice of law provision in the contract to the contrary"); *see also Matte*, 784 F.2d at 631 (concluding choice of law provision between parties violated "the federal policy expressed in [OSCLA], which seeks to apply the substantive law of the adjacent states to problems arising on the Shelf").

In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), the Supreme Court addressed whether the Death on the High Seas Act or state law, applicable by virtue of OCSLA's choice of law provision, controlled two tort claims arising out of fatal accidents on artificial drilling rigs on the Outer Continental Shelf. *Id.* at 352. The Court held that the sole remedy arose under state law and rejected wholesale the application of admiralty law. *Id.* at 355, 360 (explaining that "the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers"). The distinctive text and legislative history of OCSLA weigh against the application of admiralty law to claims arising out of the accidental death of shelf workers on platforms. *Id.* at 361 ("[T]hese structures were to be treated as island[s] or as federal enclaves within a landlocked State, not as vessels."). And under OCSLA, "for federal law to oust adopted state law federal law must first apply." *Id.* at 359. *Rodrigue* initially recognized "the operative assumption underlying [OCSLA]," that is, "admiralty jurisdiction generally should not be extended to accidents in areas covered by OCSLA." *Offshore*

Logistics v. Tallentire, 477 U.S. 207, 218 (1986) (citing *Rodrigue*, 395 U.S. at 361).[9]

While *Rodrigue* speaks to "accidents actually occurring on the [artificial] islands," 395 U.S. at 366, this situs-based element of determining whether platform-related torts are covered by OCSLA has been extended in this Circuit. *Recar*, 853 F.2d at 368-69. We have held that OCSLA's text and history require application of the Act to harm arising directly from the repair and maintenance of fixed platforms on the Shelf, even when the harm occurs as a result of a rope failure related to platform maintenance. *Id.* Thus, in this Circuit, *Rodrigue* is not limited to harm occurring on the fixed

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9. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 99 (1971), *overruled on other grounds by Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), reiterated the disjoint between OCSLA's application and the application of admiralty law occasioned by OCSLA's choice of law provision: "[OSCLA] does *not* make admiralty law applicable to" personal injury actions on an artificial island drilling rig. *Id.* (emphasis added). In the context of personal injury to workers on the Shelf, this proposition has been widely recognized. *See Gulf Offshore*, 453 U.S. at 481; *Dahlen v. Sec. Ins. Co. of Hartford*, 281 F.3d 487 (5th Cir. 2002) (rejecting argument that the Admiralty Extension Act made admiralty applicable and holding OCSLA required application of the law of the adjacent state, rather than maritime law); *Recar*, 853 F.2d at 369 (holding OCSLA granted jurisdiction and declining to review whether admiralty might also apply, independent of OCSLA). *But see Demette v. Falcon Drilling Co.*, 280 F.3d 492, 500-01 (applying the Longshore Harbor Workers' Compensation Act to an employee injured on the Outer Continental Shelf and applying maritime law to the relevant indemnity contract). Admiralty law does not govern the merits simply because OCSLA covers the cause of action, and the parties' agreement to the contrary will not alter this rule.

platform itself. *See id. Rodrigue* could not be so limited, even in the absence of *Recar*, given the plain and broad text of OCSLA, *see* 43 U.S.C. § 1333(b)(1)-(2), and the Act's legislative history, which reveals that Congress intended to treat the unique geography and commerce of the Outer Continental Shelf independently, *see Gulf Offshore*, 453 U.S. at 480 n.7; *Rodrigue*, 395 U.S. at 364-65 (explaining Congress's intent to treat causes arising out of the development of the Outer Continental Shelf differently from traditional maritime claims).[10]

Interpreting *Rodrigue*'s treatment of OCSLA in *Laredo*, we held that maritime law did not extend to cover a dispute arising out of the contract for an oil platform's construction.

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10. *Rodrigue*'s analysis of OCSLA's legislative history explains that the unique nature of the Shelf and Congress's treatment of it and its resources is inherently incompatible with admiralty law.

> Careful scrutiny of the hearings which were the basis for eliminating from [OSCLA] the treatment of artificial islands as vessels convinces us that the motivation for this change, together with the adoption of state law as surrogate federal law, was the view that maritime law was inapposite to these fixed structures. . . .

Rodrigue, 395 U.S. at 363.

Congress might have applied admiralty law to the jurisdiction covered by OCSLA, but calculated that substantive maritime law was ill-suited to serve the needs Congress intended to address. "Moreover, the committee [considering the bill underlying OCSLA] was acutely aware of the inaptness of admiralty law. The bill applied the same law to the seabed and subsoil as well as to the artificial islands, and admiralty law was obviously unsuited to that task." *Id.* at 364-65.

Laredo, 754 F.2d at 1229. "[I]n the context of oil and gas exploration on the Outer Continental Shelf, admiralty jurisdiction and maritime law will only apply if the case has a sufficient maritime nexus wholly apart from the situs of the relevant structure in navigable waters." *Id.* at 1230.

> That the contract contemplated in part the use of instruments of admiralty, therefore, is not sufficient to oust OCSLA-adopted state law in this case. Nor do we think that, under the circumstances existing here, the fact that the contract relates to offshore oil and gas exploration is itself a sufficient basis for the exercise of admiralty jurisdiction.

Id. at 1231-32.

The instant dispute materially parallels *Laredo* because, as we have explained, the relationship of the alleged wrong to traditional maritime activity is insufficient to permit the application of maritime law. And federal maritime law cannot oust the application of state law where maritime law does not apply of its own force. *See id.* at 1229.

Three conditions bear upon the question of whether adjacent state law applies as surrogate federal law under OCSLA. *Union Tex. Petroleum*, 895 F.2d at 1047.

> (1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply

> of its own force. (3) The state law must not be inconsistent with Federal law.

Id. OCSLA requires the application of state law as borrowed federal law to a non-maritime contract dispute arising out of the construction of a gathering line on the seabed of the Outer Continental shelf. *Id.* at 1050.

The first and second *Union Texas Petroleum* conditions are satisfied here. As we have already explained, the complaint arises on an OCSLA situs because the claims are inextricably linked to the construction of a platform permanently fixed to the Shelf for the purposes of development and would not have arisen but for such development. And maritime law cannot apply of its own force because there is an insufficient connection between the underlying torts and traditional maritime activity. *See id.* at 1047-48. The damages allegedly caused by a defectively designed or maintained *portion* of the crane (or by defective wire rope or by the negligent inspection and maintenance of those two specific parts engaged in the compliant tower's construction) are not the stuff of traditional maritime activity on the high seas. *See Rodrigue*, 295 U.S. at 360; *see also Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 422 (1985) (describing *Rodrigue* as "indicat[ing] that drilling platforms [are] not even suggestive of traditional maritime affairs"). There is nothing inherently maritime about the alleged causes of the damages in this case of platform construction, especially as "exploration and development of the Continental Shelf are not themselves maritime commerce." *See Herb's Welding*, 470 U.S. at 425.

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These torts arise out of the atypical circumstances of the construction of a fixed, compliant tower on the Outer Continental Shelf, an area unlike any other in its geography and resources that Congress determined require unique treatment by federal law. *See Rodrigue*, 395 U.S. at 361, 363-65. The DB-50's involvement in the accident and other elements of maritime activity that precede or surround the compliant tower's construction on the Shelf are insufficient to support either admiralty jurisdiction or the application of substantive maritime law. Texaco's claims are governed by OCSLA and not by maritime law.

This conclusion is bolstered by the contrast between the allegations of this cause of action with past circumstances under which OCSLA has not been triggered. OCSLA does not cover the wrongful deaths of platform workers "killed miles away from the platform and on the high seas simply because" of their employment status. *Tallentire*, 477 U.S. at 219. Here is not a suit arising from "a function traditionally performed by waterborne vessels," *id.*, but rather a claim arising from traditionally non-maritime products liability and negligence in the maintenance or inspection of specific parts related to construction of a fixed, compliant tower on the Outer Continental Shelf. OCSLA controls to the exclusion of admiralty law.[11]

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11. *Texaco I* does not preclude our conclusion here that admiralty has no application. *Texaco I* did not address subject matter jurisdiction, nor did it review the substantive law applicable to the action. 243 F.3d at 908-12. References in the opinion to admiralty law were not central to the holding that the Arbitration Act required a stay of the proceedings between Texaco and McDermott to permit

(Cont'd)

Accordingly, we also must remand for further proceedings because the district court erred in its application of substantive maritime law to Texaco's claims. An additional difficulty presents on this record: no party identifies the adjacent state such that the law of the adjacent state may be applied. *See Union Tex. Petroleum*, 895 F.2d at 1047. On remand, the first order of business will be the determination of which state's law applies under OCSLA. Subsequently, the district court should address the jury demand in light of the applicable state products liability and negligence law.

C. Denial of Jury Trial Was Not Harmless Error

AmClyde argues that even if a jury trial were properly requested, there was no harmful error in the district court's denial of the jury trial demand because Texaco's case failed to survive AmClyde's Rule 50(a) motion for judgment as a matter of law. *See McDonald v. Steward*, 132 F.3d 225, 230 (5th Cir. 1998) (providing settled law that "even if a party is erroneously denied a jury trial, the error is harmless if the evidence could not have withstood a motion for a directed verdict at trial"); *Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 220 (5th Cir. 1984).

(Cont'd)

the arbitration required by the parties' contractual agreement, but the panel assumed admiralty's application in order to resolve the narrower question put before it. *Id.* at 912. Indeed, the panel did not resolve definitively whether admiralty applied, stating instead that "regardless of whether the Petronius construction contract is treated as a maritime transaction or simply as interstate commerce, the FAA applies." *Id.* at 909 n.2.

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We review the district court's judgment as a matter of law *de novo*. *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403, 409 (5th Cir. 2004). Judgment as a matter of law is appropriate only when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court determines reasonable people could not arrive at a contrary verdict. *Id.*

Texaco argues that substantial evidence on disputed facts supports the possibility of a jury verdict in its favor. In light of our conclusion that OCSLA and, under 43 U.S.C. § 1333, the law of the adjacent state apply, we cannot say that the denial of jury trial in this case was harmless error. In the absence of the application of admiralty law, AmClyde's arguments supporting bench trial disposition of this cause, on the sole basis of maritime law, evaporate. Moreover, the volumes of disputed facts and contradictory expert opinions presented prevent us from concluding that no reasonable jury would find for Texaco. Experts opined on physical evidence and calculations related to the functioning of the crane, and contradictory opinions on those facts requires the conclusion that a reasonable jury might find in favor of Texaco.[12]

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12. Texaco also argues that the district court abused its discretion in excluding the testimony of two Texaco witnesses, Messrs. Zielinski and Czerniak, as a sanction for Texaco's failure to timely disclose protected proprietary information to parties. Texaco argues that the court's improper sanction exacerbated the harm caused by the denial of jury trial. Finding that the error was not harmless on other grounds, we need not resolve this issue, but we note that whatever reasons precipitated the district court's sanction for discovery delay will not exist on remand.

For the foregoing reasons, on this record we cannot affirm the district court's judgment as a matter of law in AmClyde's favor. We must remand for further proceedings in light of our holdings that the district court exercises subject matter jurisdiction over the cause based upon OCSLA; that, contrary to the parties' assertions, the nature of Texaco's cause does not permit the application of admiralty law; and that, under OCSLA, the substantive law applicable to Texaco's claim on remand is the law of the adjacent state, *see* 43 U.S.C. § 1333(a)(2)(A).

II. Underwriters' Appeal

Underwriters separately appeal the district court's entry of summary judgment against them on issues related to insurance coverage under the Builder's Risk Policy and defense costs awarded to AmClyde.[13] The parties fail to identify the applicable law, although Underwriters suggest the dispute is resolved in the same manner whether Texas or Louisiana law applies to the insurance policy. The district court did not conduct a choice-of-laws analysis and applied the law of Louisiana to the cross motions for summary judgment. No party objected to that choice of law below, and no party objects to the application of Louisiana law to the insurance policy disputes on appeal.

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13. Again, the actions of Texaco and Underwriters were initially separate, but the district court consolidated them on Underwriters' motion for reasons of expediency. On appeal, Texaco and Underwriters separately briefed their challenges to the district court's rulings, and accordingly, we treat them separately here.

Appendix B

A. AmClyde Is an "Other Assured" Under the Builder's Risk Policy Entitled to Waiver of Subrogation and Defense Costs

Underwriters appeal the district court's October 11, 2001 order that under the Heddington Offshore Construction Risks Policy (the "Builder's Risk Policy"), AmClyde was an "other assured" entitled to a waiver of subrogation and costs under the policy's terms. Underwriters argue that to be included as an other assured a party must have a written contract with Texaco, the principal assured, and that AmClyde lacks such a written contract. Underwriters further argue that AmClyde cannot be an other assured even if no written agreement is required. Underwriters challenge the district court's determination that AmClyde is entitled as an other assured to the protection of the subrogation clause and the court's award of costs to AmClyde under the policy.

1. AmClyde Is an Other Assured Under the Policy

The "other assured" provision of the Builder's Risk Policy states,

> J. Ray McDermott, Inc. and/or Gulf Island Fabrication, Inc. and/or W.H. Linder & Associates, Inc. and/or Waldemar S. Nelson and Company, Inc. and/or Project Consulting Services, Inc. *and/or other contractors and/or sub-contractors and/or suppliers and any other company, firm, person or party with whom the Assured(s) in (1), (2) or (3) of this Clause have, or in the past had, entered into written agreement(s)* in connection with the

> subject matters of Insurance, and/or any works, activities, preparations etc. connected therewith.

Builder's Risk Policy, at 2, ¶1. (emphasis added).[14]

The parties dispute the proper reading of the above listing of covered entities and persons; in particular, they dispute whether the "written agreement(s)" requirement applies only to "any other company, firm, person or party" or, instead, applies to all preceding entities. According to Underwriters, the requirement of past or current "written agreement(s)" applies to each preceding entity in the entire list. Underwriters would read the requirement of entry into written agreement to apply to "other contractors and/or sub-contractors and/or suppliers and any other company, firm, person or party." According to AmClyde, the list separates entities with the conjunction "and/or" and therefore, the written agreement provision applies only to "any other company, firm, person or party." Under AmClyde's reading, "other contractors" and "sub-contractors" are each "other assureds," irrespective of any written agreement with Texaco or another principal assured.

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14. The principal assureds are defined as

(1) Texaco Exploration and Production, Inc. and/or Marathon Oil Company Inc. and/or associated partners in the Petronius Project and/or as may be agreed hereon.

(2) Parent and/or subsidiary and/or affiliated and/or associated and/or inter-related companies of the above as they now exist or may hereafter be constituted and their Directors, Officers and/or employees and/or other participants as may be agreed.

(3) Project managers, if applicable.

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We review the district court's legal conclusions, including its interpretation of contracts, *de novo. Taita Chem. Co. v. Westlake Styrene Corp.*, 246 F.3d 377, 385 (5th Cir. 2001); *Nolan v. Golden Rule Ins. Co.*, 171 F.3d 990, 992 (5th Cir. 1999). In interpreting the language of the Builder's Risk Policy on AmClyde's motion for summary judgment, the district court applied Louisiana law, and the parties do not contest the choice of law. Underwriters submit that the Builder's Risk Policy enjoys equal contacts with Texas and Louisiana and urges that the issue presented is resolved identically under either state's law.

A contract is unambiguous if "its language as a whole is clear, explicit, and leads to no absurd consequences, and as such it can be given only one reasonable interpretation." *Chembulk Trading LLC v. Chemex Ltd.*, 393 F.3d 550, 555 n.6 (5th Cir. 2004). The clear construction of the provision provides a list of categories of assureds, separating each category by the conjunction "and/or." The final category is itself a list with an attendant qualification: "suppliers and any other company, firm, person or party" with whom an assured entered an applicable written agreement.[15] Thus, the requirement of written agreement does not apply to the separate categories that precede this final sub-list, including a subcontractor. Under the unambiguous language of the Builder's Risk Policy, a contractor or subcontractor may be an other assured, irrespective of the written agreement qualification.

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15. That it might be debated whether the written agreement qualification applies only to "other company firm, person or party" or to those entities as well as "suppliers" need not be resolved here because AmClyde is a subcontractor.

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Underwriters point to *OPI International, Inc. v. Gan Minster Insurance Co.*, an unpublished opinion from the Southern District of Texas, in support of their argument that AmClyde is not an other assured. *See* Nos. H-94-2756, H-94-3412, H-94-3413, 1996 WL 650130 (S.D. Tex. Mar. 12, 1996). But *OPI International* does not inform the analysis in this matter because the policy language at issue there was materially different from the other assured definition at issue here. *See id.* at *3. In *OPI International*, the definition of other assureds included "contractors and/or subcontractors" within the group of "other Compan[ies]" with whom the assureds had entered into contracts. *See id.* Such is not the case here, where the other assured definition separates subcontractors, contractors, and suppliers from the group of other companies with whom the assureds have entered into written contracts.

Moreover, Underwriters' proposed reading of the policy provision would result in the absurdity that a covered subcontractor would be required to have entered into a written contract with Texaco or a principal assured, thereby becoming a contractor. By definition, a subcontractor enters into an agreement with a contractor, rather than the principal party whose performance is payment in exchange for the provision of goods or services or the completion of a project. *See, e.g.*, BLACK'S LAW DICTIONARY 1464 (8th ed. 2004). Had AmClyde contracted with Texaco or a principal assured, a party to the contract who sought the Petronius construction project's completion, AmClyde would be a contractor as opposed to a subcontractor. Underwriters' reading of the "other assured" provision would render the term "subcontractor" surplusage, and such a reading must be avoided under Louisiana law

and under principles of contract interpretation both generally and in the maritime context. *See* LA. CIV. CODE ANN. art. 2049; *Chembulk Trading*, 393 F.3d at 555; *Transitional Learning Cmty. at Galveston, Inc. v. U.S. Office of Personnel Mgmt.*, 220 F.3d 427, 431 (5th Cir. 2000). The district court correctly concluded that the unambiguous policy language does not require a written agreement with respect to a subcontractor in order for the subcontractor to qualify as an other assured. Having determined that the policy language is unambiguous, we need not reach beyond the four corners of the document to explore the intent of the parties. *See, e.g., Ingalls Shipbuilding v. Fed. Ins. Co.*, 410 F.3d 214, 220 (5th Cir. 2005).

Underwriters next argue that even in light of the reading we determine the policy requires, AmClyde is not a subcontractor and therefore cannot qualify as an other assured. "A subcontractor is one who takes a portion of a contract from the principal contractor or another subcontractor." *Avondale Indus., Inc. v. Int'l Marine Carriers, Inc.*, 15 F.3d 489, 494 (5th Cir. 1994). "A subcontractor may or may not have an agency relationship with the contractor and that relationship does not control whether or not a subcontract has been struck." *Id.*

The record reflects that AmClyde is a subcontractor to Texaco's Petronius tower construction project. AmClyde and McDermott entered a written agreement requiring AmClyde's provision of work to McDermott and covering the work provided by AmClyde to the Petronius tower construction project. The record also reveals that subject to its contract with McDermott, AmClyde provided the following services

to the Petronius construction project: design of the deep water lowering system for use on the underwater installation of the tower support structure for the Petronius project, technical advice to McDermott related to the crane's extended travel service and underwater use during the Petronius project, and technical advice on the main hook loading for the lifts of the North and South Deck Modules, specifically.

In light of the contractual agreement between AmClyde and McDermott, in combination with AmClyde's provision of work to the Petronius project itself subject to that contract, including the the very lift of the deck module most closely tied to the property loss at the heart of this case, AmClyde is a subcontractor to the Petronius tower construction project. And although the degree of AmClyde's role in the overall construction of the compliant tower may not be substantial when compared to others' roles in construction, AmClyde's efforts in designing the lowering system used to install the support structure of the compliant tower and in calculating the hook eccentricity, a requisite part of the lifts, were integral to and required for compliant tower construction. Also, the allegations in Underwriters' own complaint support in part that Underwriters understood AmClyde's status as a subcontractor. Underwriters alleged that AmClyde's technical contribution to and efforts in the design and maintenance of the crane were specifically "in connection with" the Petronius project. Underwriters alleged AmClyde's negligence in "maintaining and/or inspecting the crane in connection with . . . the Texaco Petronius Project, specifically, including the South Deck Module."

After careful review of the record, the briefs of the parties, and the oral arguments, we affirm the district court's

conclusion that AmClyde is an "other assured" under the Policy on the basis that AmClyde was a subcontractor. The record reflects AmClyde's subcontractor status in form of a written agreement to provide work to McDermott and AmClyde's actual provision of work, under contract with McDermott, related to the Petronius tower construction project. As subcontractor, under the Policy's unambiguous language, AmClyde is an other assured. The policy provides for waiver of subrogation against any assured and any entity or person "whose interests are covered by this Policy." Thus, AmClyde is entitled to the waiver of subrogation.

2. The District Court Properly Awarded Costs to AmClyde

Underwriters argue that the district court erred in awarding costs to AmClyde for its defense. In pertinent part, the Builder's Risk Policy provides,

> With respect to costs, the Builder's Risk Policy provides
> Subject only to the limits and deductibles of this Policy, the Company agrees to pay costs, charges and expenses reasonably incurred in investigating and/or defending any claim or incident which in the Assured's opinion may result in a claim being pursued against them in connection with this project. This policy will also reimburse the Assured for expenditures necessarily incurred in obtaining legal representation and/or non-legal expert witness(es) in the event of a public

> or government enquiry into any accident or occurrence, provided such accident or occurrence would give rise to a claim under this policy.

Builder's Risk Policy, at 6, ¶ 11.

Underwriters argue that the above clause does not apply because the claims related to delay defended by AmClyde are excluded from coverage under both the property damage section, section one, and the general liability sections of the policy. Underwriters also argue that the policy bars coverage for claims between insureds for damage to the insured property. Underwriters finally objects to the district court's costs award, arguing that costs were awarded twice to AmClyde. AmClyde argues that the plain meaning of the clause supports the award of defense costs and that the amount of the award was proper.

According to Underwriters, the division of the policy into two relevant sections – section one regarding physical damage and section two regarding general liability – requires that the costs award was in error because AmClyde, not an "other insured" under section two of the policy but an "other assured" under the physical damage section, cannot recover third party liability defense costs. Underwriters argue that any other result confuses the nature of third party liability and first party property coverage.

Section two of the policy contains a cross-liability clause that permits coverage of claims or potential claims between assureds. The clause explains that such cross-liability coverage will not operate to increase the limit of liability

and that section two does not provide coverage for physical loss of or damage to the insured property. Underwriters reads the cross- liability provision broadly and in combination with the costs provision to indicate that costs cannot be recovered in relation to the delay claim between assureds here. In support of this argument, Underwriters relies on *Agip Petroleum Co. v. Gulf Island Fabrication, Inc.*, No. 00-20487 (5th Cir. Nov. 28, 2001). In *Agip Petroleum*, a panel of this Court addressed an appeal of summary judgment for Underwriters regarding general liability coverage and concluded that under Texas law, a builder's risk policy with a general liability provision similar to section two here did not provide coverage for liability claims between assureds for damages to the insured property. *Id.* at 7, 17. In *Agip Petroleum*, Underwriters did not appeal the summary judgment awarded to the contractors in regard to the subrogation claim, and the Court did not address the issue of costs. *See id.* at 7. According to Underwriters, the Costs Clause at issue here operates only when a covered claim arises and no such claim exists here because Texaco chose not to insure damages due to delay. Underwriters cites *Agip Petroleum* for the proposition that the delay damages are not covered, thereby precluding the award of costs in the defense of one insured against another for uninsured damages. AmClyde argues that the plain meaning of the clause supports the conclusion that its defense costs against Texaco must be paid by Underwriters and therefore the district court properly awarded costs.

We agree with AmClyde that a plain reading of the Costs Clause indicates Underwriters must pay costs incurred by an insured to defend a claim "in connection with" the Petronius

construction project. In relevant portion, the policy states, "the Company agrees to pay costs . . . reasonably incurred in . . . defending any claim or incident which in the Assured's opinion may result in a claim being pursued against them in connection with this project." Moreover, the policy provides for defense costs in relation to "a public or government enquiry into any accident or occurrence [that] would give rise to a claim under this policy." The clause fails to limit costs to the defense of certain claims, and contrary to Underwriters' characterization, the plain language of the Costs Clause provides a broad duty to pay defense costs connected to the compliant tower's construction even when the clause is read in conjunction with other policy provisions. The broad language of the Costs Clause permits a costs award even in relation to a claim that may not ultimately be covered under the policy language. We affirm the district court's award of costs to AmClyde under the Builder's Risk Policy.

With respect to Underwriters' argument that costs were erroneously awarded twice, we similarly affirm the district court's award. Pretrial, AmClyde and Underwriters stipulated to the reasonableness of eighty percent of the defense costs. Underwriters challenged the remainder on the ground that costs for all multiple entities, including two not insured under the policy, were included in the calculation and requested allocation among the defendants. The district court granted costs in the stipulated amount of $2,534,000 but did not require allocation, finding that the two entities not insured were predecessors in interest to AmClyde that were represented by AmClyde's counsel and that the entities appeared, in all respects, in the same posture as AmClyde, facing the same liability and requiring precisely the same defense as did AmClyde.

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Underwriters argue the burden of allocating defense costs falls to AmClyde. Underwriters rely upon *Enserch Corp. v. Shand Morahan & Co.*, 952 F.2d 1485, 1493 (5th Cir. 1992). AmClyde argues that no allocation is necessary because the four entities related to AmClyde were all sued in the same capacity and that no basis exists for deducting costs associated with any entity's defense because its liability was wholly derivative of AmClyde's. AmClyde points to the repeated reference to the four entities defending the faulty design, manufacture, and inspection of the crane as either "AmClyde" or the "AmClyde Defendants." AmClyde cites in support a district court opinion from California where the court did not require allocation in the case of a non-insured party's liability deriving entirely from the insured party and a covered claim. *See Raychem Corp. v. Fed. Ins. Co.*, 853 F. Supp. 1170, 1180 (N.D. Cal. 1994). In arguing that an allocation is unnecessary, AmClyde points to no controlling law on point.

The record makes clear that the nature of the AmClyde related entities was well understood to all parties and to the district court below. AmClyde's incurred defense costs properly result from the uniform defense of multiple factual entities appearing before the court as one legal entity based upon Texaco and Underwriters' complaints and the nature of the claims. This Circuit has not required an allocation on such a record, and Underwriters fail to point to any controlling law so requiring. Finding no error in the court's award, we affirm the award of defense costs to AmClyde.

Appendix B

B. JRMIV Is an Other Assured Entitled to Waiver of Subrogation

Based upon the foregoing, we similarly affirm the district court's conclusion that JRMIV was an other assured entitled to waiver of subrogation. JRMIV argued before the district court that Underwriters could not proceed in subrogation against it because of express waivers of subrogation in the Builder's Risk Policy and because JRMIV is an other assured against whom subrogation is waived. On March 31, 2003, the district court granted JRMIV's motion for dismissal of Underwriters' subrogation action. The court held that Underwriters expressly waived rights of subrogation against it as an insured in the Builder's Risk Policy because JRMIV qualified as an insured subcontractor. The court also concluded that JRMIV is an affiliate or contractor/subcontractor under the waiver of subrogation provision for affiliate entities and is also therefore entitled to waiver of subrogation. Alternatively, the district court concluded that JRMIV did not bear liability for any unseaworthiness of the DB-50 because McDermott was the bareboat charterer of the DB-50 and was, as such, solely responsible for the vessel's operation. The district court accordingly dismissed Underwriters' claims against JRMIV.

Because we conclude that the unambiguous policy language does not require a written agreement in order for a contractor or subcontractor to qualify as an other assured entitled to waiver of subrogation, we need here only address whether JRMIV was a subcontractor or contractor to the compliant tower's construction to resolve its status as an other assured. JRMIV argues that its contribution to the Petronius

construction project qualifies it as either or both. Underwriters disagrees, echoing its arguments with respect to AmClyde, that is, that the definition of "other assureds" requires a written contract of all entities and that therefore JRMIV does not qualify as an other assured.

The policy expressly includes as an other assured, entitled to waiver of subrogation, a contractor with Texaco relating to the Petronius construction project. As previously explained, McDermott entered a written construction agreement with Texaco covering the Petronius tower construction project. There, the parties defined as a "Contractor" both (1) McDermott and (2) McDermott's "parent, subsidiaries, and affiliates, the agents, employees and subcontractors of any of them." McDermott and JRMIV are affiliates; both are wholly owned subsidiaries of McDermott Holdings. Accordingly, Texaco and McDermott defined JRMIV as a Contractor to the Petronius construction project in the written construction agreement. Moreover, JRMIV, the owner of the DB-50 and attached crane, provided the vessel that was a subject of the construction contract. JRMIV's provision of the vessel satisfied the construction contract's guarantee provided by Contractor (that is, McDermott and JRMIV as an affiliate of McDermott) for the provision of the DB-50 to perform the installation activities described in the construction contract. JRMIV was a contractor to the Petronius project under the terms of the construction contract and, accordingly, under the terms of the Builder's Risk Policy. As the written agreements of the parties require us to so conclude, we need not also address the other arguments advanced by JRMIV to trigger its status as an other assured.

Appendix B

The district court correctly dismissed Underwriters' subrogation claim against JRMIV, and although multiple arguments may have supported such action, we need not address any other argument offered in support of the dismissal of Underwriters' claim.

CONCLUSION

With respect to Texaco's appeal, we hold that OCSLA extends federal subject matter jurisdiction to the tort action that arose on the unique construction site of the Petronius compliant tower; that admiralty jurisdiction and maritime law do not apply so as to oust the substantive law of the adjacent State; and that in light thereof, the denial of jury trial cannot be said to be harmless.

On remand, the district court should permit Texaco an opportunity to amend its pleading and should request that the parties address at the outset which state's law is adjacent to the Petronius compliant tower and determine accordingly the applicable tort law under OCSLA. Texaco has preserved its request for a jury trial as well as its request for the inclusion of its experts' testimony. The district court should reassess the jury trial demand and the admissibility of the experts' testimony in light of the state's law that is borrowed as federal law under OCSLA.

We affirm the district court's dismissal of Underwriters' suit seeking subrogation against AmClyde and JRMIV. Each entity is an other assured entitled to waiver of subrogation, and the court did not err in its award of defense costs to AmClyde.

Accordingly, we affirm in part and reverse in part the district court's judgment and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED OCTOBER 30, 2003 AND FILED OCTOBER 31, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 99-3623
c/w 99-3646

SECTION "B" (5)

TEXACO EXPLORATION AND PRODUCTION INC., AND MARATHON OIL COMPANY

VERSUS

AMCLYDE ENGINEERED PRODUCTS COMPANY, INC., ET AL.

FINAL JUDGMENT

This action came for an admiralty bench trial on the liability phase before the Honorable Judge Ivan L. R. Lemelle, United States District Judge, from October 15, 2001 through December 6, 2001, and the matter was taken under advisement. On October 11, 2000, the Court had granted the motion of Lloyd's Register of Shipping to strike the jury demand of Texaco Exploration and Production Inc. [Minute Entry, Rec. Doc. 273].

Appendix C

On March 27, 2003 [Minute Entry, Rec. Doc. 1176], after having considered the evidence presented by all parties at trial, having considered the defendants' oral and written Motions for Judgment as a Matter of Law made at the conclusion of the case and after hearing closing arguments from all parties, the Court found that plaintiffs, Texaco Exploration and Production Inc., Marathon Oil Company and Certain Underwriters at Lloyd's and London Market Insurance Companies subscribing to Policy Nos. S611625 and S611626 ("Underwriters"), failed to sustain their burden of proof against all defendants except J. Ray McDermott International Vessels, Ltd. Alternatively, the Court found that the negligence of third party defendant, J. Ray McDermott, Inc., was a superceding cause of the loss of the South Deck Module. Accordingly, for reasons orally assigned in open court prior to and following the Minute Entry dated March 27, 2003 [Minute Entry, Rec. Doc. 1176], which reasons are incorporated herein, the Court entered an order **DISMISSING WITH PREJUDICE** the claims and demands of plaintiffs, Texaco Exploration and Production Inc., Marathon Oil Company and Underwriters, against defendants, AmClyde Engineered Products, Inc., AmClyde Engineered Products Company, Inc., Friede Goldman Halter, Inc., United Dominion Industries, Inc., Lloyd's Register of Shipping, Noble, Denton & Associates, Inc. and Grignard Company, L.L.C., and finding liability against J. Ray McDermott International Vessels, Ltd., a named defendant in Underwriters' action (Civil Action No. 99-3646) and a defendant pursuant to Fed. R. Civ. Proc. 14(c) in Civil Action No. 99-3623. The order as respects the liability found by the Court on the part of J. Ray McDermott International Vessels, Ltd. was subsequently vacated as is set forth below. The Court

further **GRANTED** the motions for judgment as a matter of law filed by AmClyde Engineered Products, Inc., AmClyde Engineered Products Company, Inc., Friede Goldman Halter, Inc., United Dominion Industries, Inc., Lloyd's Register of Shipping, Noble, Denton & Associates, Inc. and Grignard Company, L.L.C. to the extent the same were consistent with its ruling upon the merits, and **DISMISSED AS MOOT** any and all derivative cross claims and third party claims.

On December 9, 2002, J. Ray McDermott International Vessels, Ltd. filed a Motion for Summary Judgment on the Grounds That It Has No Underlying Liability to Texaco Exploration and Production Inc., Marathon Oil Company and Underwriters [Rec. Doc. 1260] and also filed a Motion for Summary Judgment against Underwriters Based on Coverage Provisions [Rec. Doc. 1261].

On January 13, 2003 [Minute Entry, Rec. Doc. 1280], after hearing oral argument and considering the evidence and memoranda submitted by the parties and having granted Texaco's motion to strike any new evidence [Record Doc. Nos. 1273 and 1280], the Court **GRANTED** J. Ray McDermott International Vessels, Ltd.'s motion for summary judgment [Rec. Doc. 1260] on the grounds that it had no underlying liability to Texaco Exploration and Production Inc. and Marathon Oil Company. The Court **VACATED** that part of its previous March 27, 2003 [Minute Entry, Rec. Doc. 1176] findings to the contrary. Accordingly, Texaco Exploration and Production Inc.'s and Marathon Oil Company's claims against J. Ray McDermott Vessels International, Ltd. were **DISMISSED WITH PREJUDICE.**

Appendix C

On March 31, 2003 [Minute Entry, Rec. Doc. 26 (99-3646)], after considering the evidence and memoranda submitted by the parties, the Court **GRANTED** J. Ray McDermott International Vessels, Ltd.'s original, post-trial Motion for Dismissal filed on its *in personam* behalf and as owner of the Derrick Barge 50 [Rec. Doc. 1100] and **VACATED** that part of its March 27, 2003 [Minute Entry, Rec. Doc. 1176] ruling to the contrary. Accordingly, Underwriters' claims against J. Ray McDermott Vessels International, Ltd. in its *in personam* capacity and as owner of the Derrick Barge 50 were **DISMISSED WITH PREJUDICE.**

On September 12, 2001, the Court granted Lloyd's Register of Shipping's motion for summary judgment dismissing plaintiffs' claims against Lloyd's Register of Shipping for negligent misrepresentation [Minute Entry, Rec. Doc. 859].

On October 11, 2001 [Rec. Doc. 1003], after hearing oral argument and considering the evidence and memoranda submitted by the parties, the Court **GRANTED IN PART** the motion for summary judgment [Rec. Doc. 299] of defendants, AmClyde Engineered Products, Inc., AmClyde Engineered Products Company, Inc., and United Dominion Industries, Inc., finding that AmClyde Engineered Products, Inc. and AmClyde Engineered Products Company, Inc. were "other insureds" under the Builder's Risk policies and beneficiaries of the waiver of subrogation. The Court **DENIED** that part of the motion pertaining to United Dominion Industries, Inc., finding that United Dominion Industries, Inc., did not qualify as an "other insured" under

the policies. Accordingly, Underwriters' claims against AmClyde Engineered Products, Inc. and AmClyde Engineered Products Company, Inc. were **DISMISSED WITH PREJUDICE.**

On October 8, 2003 [Minute Entry, Rec. Doc. 1302], after hearing oral argument and considering the evidence and memoranda submitted by the parties, and for reasons orally assigned in open court, the Court **GRANTED** AmClyde Engineered Products, Inc.'s and AmClyde Engineered Products Company, Inc.'s motion for summary judgment for recovery of defense costs [Rec. Doc. 1290] against Underwriters. The Court found that AmClyde Engineered Products, Inc. and AmClyde Engineered Products Company, Inc. were entitled to recover reasonable defense costs of $2,534,000 from Underwriters under the terms of the Builder's Risk policies.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all claims and demands of plaintiffs, Texaco Exploration and Production Inc., Marathon Oil Company and Certain Underwriters at Lloyd's and London Market Insurance Companies subscribing to Policy Nos. S611625 and S611626, against defendants, AmClyde Engineered Products, Inc., AmClyde Engineered Products Company, Inc., Friede Goldman Halter, Inc., United Dominion Industries, Inc., Lloyd's Register of Shipping, Noble, Denton & Associates, Inc., Grignard Company, L.L.C., and J. Ray McDermott International Vessels, Ltd., and the Derrick Barge 50 *in rem*, be and hereby are **DISMISSED WITH PREJUDICE,** with plaintiffs to bear all costs as may be taxed according to law in favor of Defendants Lloyd's Register of

Shipping, Grignard Company, L.L.C., and J. Ray McDermott International Vessels, Ltd. Costs in favor of the AmClyde interests are awarded *infra*.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims for indemnity and contribution by and between the parties, whether by cross-claim, third party demand or otherwise, be and hereby are **DISMISSED AS MOOT.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be and hereby is rendered in favor of third party plaintiffs, AmClyde Engineered Products, Inc. and AmClyde Engineered Products Company, Inc., and against third party defendants, Certain Underwriters at Lloyd's and London Market Insurance Companies subscribing to Policy Nos. S611625 and S611626, for **TWO MILLION FIVE HUNDRED THIRTY-FOUR THOUSAND AND NO/100 ($2,534,000) DOLLARS,** together with post-judgment judicial interest thereon until paid and all court costs as may be taxed according to law for the successful prosecution of and defense to all claims. To the extent the coverage limits of Policy No. 5611625, the primary Builders' Risk policy, may have been exhausted, then Policy No. S611626, the excess Builder's Risk policy, shall be applied to cover this judgment.

New Orleans, Louisiana this 30th day of October, 2003.

s/ Ivan L.R. Lemelle
IVAN L.R. LEMELLE
UNITED STATES DISTRICT JUDGE

APPENDIX D — EXCERPTED TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED MARCH 27, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS

DOCKET NO: 99-3623 C/W
99-3646, 00-813
NEW ORLEANS, LOUISIANA
SECTION: "B"
MARCH 27, 2003

CLOSING ARGUMENTS AND
MOTIONS FOR JUDGMENT

TEXACO EXPLORATION, ET AL

VERSUS

AMCLYDE ENGINEERED, ET AL.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE IVAN L.R. LEMELLE
U. S. DISTRICT JUDGE

* * *

THE COURT: Good morning, be seated. Call the case, Miss Steward.

Appendix D

BY THE CLERK: Civil action number 99-3623 and consolidated cases, Texaco Exploration and Production versus AmClyde Engineered Products.

* * *

And as you will recall I held early on that maritime law applied and I would seek to then evaluate this case under traditional maritime law principles.

* * * *

APPENDIX E — ORDERS AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED OCTOBER 11, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

No. 99-3623 C/W
9-3646 C/W
00-813 C/W
00-1232

TEXACO EXPLORATION AND PRODUCTIONS, INC., ET AL

VERSUS

AMCLYDE ENGINEERED PRODUCTS COMPANY, INC., ET AL

ORDERS AND REASONS

Before the Court is Defendants Lloyd's Register of Shipping Motion to Strike Demand for a Jury Trial (Rec. Doc. No. 238). Lloyd's contends that there is no right to a trial by jury under the Constitution or statutes of the United States as to any issue in this case. Further, because this Court has already held that the claims are cognizable solely in admiralty and because there is no other basis for the court to exercise non-admiralty jurisdiction, there is no right to a jury

trial. The plaintiffs respond that their OCSLA claims provide an independent basis for requesting a jury trial despite the holding of the Court that admiralty governs the case. For the following reasons, the motion is **GRANTED.**

The Court reiterates that this action is cognizable solely in admiralty jurisdiction. Consistent with this holding, the plaintiff is not entitled to a trial by jury. In the Fifth Circuit, when a case involves admiralty jurisdiction and cannot be brought pursuant to any other jurisdictional basis, admiralty jurisdiction applies regardless of whether the plaintiffs has made a Rule 9(h) designation. *See Baris v Sulpicio Lines, Inc.*, 932 F 2d 1540, 1547 (5th Cir. 1991). In *Baris*, the court found that no special allegations regarding rule 9(h) was required because the DOHSA claim alleged that case could have been brought only in admiralty , in the absence of diversity.

Once the Court determines that admiralty law solely applies, the right to a jury trial is extinguished. In *Durden*, the Fifth Circuit affirmed the dismissal of the jury once all non-admiralty claims were removed from the case. The Court explained:

> Had the district court not dismissed that claim, Durden could have presented it and his related maritime claims to a jury. After the dismissal of the Jones Act claim, there remained only the claim against SANKO PRESTIGE in rem and a claim against the shipowner in personam for the unseaworthiness of the vessel and its negligent operation. Because of Durden's settlement, with

> his employer, there was no Jones Act claim to go to the jury and the trial court could, as it properly did, take for itself the determination of the remaining claims, which were subject to the admiralty jurisdiction of the court. If the rule were otherwise, any plaintiff who could allege diversity jurisdiction could receive a jury trial on his admiralty claims simply by alleging a Jones Act count, whether or not he had any evidence to support it and whether or not he had settled the claim. The time has not yet come when a plaintiff is entitled to a jury in every admiralty action.

803 F.2d at 848-49; *see also Jacobs v. Northern King Shipping Co., Ltd.*, No. Civ. A 97, 772, 1997 WL 772807 (E.D. La. Dec. 11, 1997) (holding that the plaintiff has no right to a jury trial because all of her general maritime and state law claims are preempted by DOHSA and acknowledging that Fifth Circuit precedent holds that there is no right to jury trial where state law claims are attached to an in rem admiralty claim and where plaintiff clearly denominates her case as one arising under the court's admiralty and maritime jurisdiction).

The Court is not persuaded by the alleged overlap of OCSLA and admiralty jurisdiction in the present case because the Fifth Circuit has instructed that admiralty law governs when the nexus and situs tests are satisfied. *See Laredo*, 754 F.2d at 1229 (acknowledging "that where admiralty and OCSLA jurisdiction overlap, the case is governed by maritime law"). Once this Court determines that admiralty governs, as it has in the instant case, the plaintiff does not

have a right to a jury. *Russell v. Atlantic &Gulf Stevedores*, 625 F. 2d 71, 72 (5th Cir. 1980) (no right to jury trial when claims based on general maritime law). In *Stevenson v. Point Marine*, 697 F. Supp. 285, 288 (E.D. La. 1998) the court concluded that because the action was cognizable only under this court's admiralty jurisdiction and because admiralty courts traditionally sit without a jury, the jury demand would be stricken.[1] *Compare Solet v. CNG Producint Co.*, 908 F. Supp. 375, 378 (E.D. La. 1995) (where maritime and OCSLA jurisdiction overlapped, the court denied the motion to strike the jury demand because the facts of the case failed to satisfy the nexus test where the plaintiffs accident bore little or no relation to traditional maritime operations).[2]

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1. The cases cited by the plaintiffs do not convince the court that their OCLSA claims allow a jury trial. Most of those cases which did not discuss the jury demand issue involved situations where OCSLA jurisdiction was found to apply. *See Recar v. CNG Producing Co.*, 853 F. 2d 367 (5th Cir. 1988) (OCSLA jurisdiction applied to the injured platform worker to the exclusion of admiralty) *Hufnagel v. Omega Serv. Indus.*, 182 F. 3d 340 (5th Cir. 1999) (same) and *Laredo Offshore Constractors, Inc. v. Hunt Oil Co.*, 754 F. 2d 1223 (5th Cir. 1985) (OCSLA was the sole basis for jurisdiction in a suit for non-payment on a platform installation contract).

2. Other cases cited by the plaintiffs confirm that absent diversity or some other basis for the court to exercise non-admiralty jurisdiction, there is no right to a jury trial. *See Powell v. Offshore Navigation Inc.*, 644 F. 2d 1063, 1071 (5th Cir. 1981) (because there was no independent basis for federal jurisdiction, the jury request was denied), *Durden v. Exxon Corp.*, 803 F. 2d 845 (5th Cir. 1986) (court properly dismissed jury when plaintiff's Jones Act claim was dismissed, leaving only claims against the vessel *in rem* and the shipowner *in personam* under general maritime law).

Moreover, this Court rejects the plaintiffs invocation of the savings to suitors clause in 28 U.S.C. §1333. That provision has been construed to permit admiralty and maritime actions, otherwise exclusively within the jurisdiction of the federal district courts, to be brought in state court as well. *Baris*, 932 F.2d at 1543. In *Linton v. Great Lakes Dredge and Dock Co.*, 964 F.2d 1480, 1487 (5th Cir. 1992), the court addressed the jury issues regarding the savings to suitors clause and found that a jury trial was not required by the clause:

> We think that, particularly in the view of the revised wording of the "savings to suitors" clause, the Supreme Court cases do not require a jury trial as an element of a "savings to suitors" remedy. Stated differently, a maritime non-jury action is not necessarily outside the "savings to suitors" clause and within the exclusive admiralty jurisdiction of the federal court.

Similarly, the Fifth Circuit in *Bynum v. Patterson Truck Lines, Inc.*, 655 F. 2d 643 (5th Cir. 1981), addressed the savings to suitors clause in the context of a jury demand denial. The plaintiff in *Bynum* appealed the denial of his jury request arguing that because of the savings to suitors clause of §1333(1), he was entitled to a jury trial of his negligence claim, which he brought under diversity jurisdiction. The *Bynum* court affirmed "the denial of a jury trial, finding that there is no diversity jurisdiction (permitting trial by jury) [because of the presence of two non-diverse defendants] and that federal jurisdiction of his claim is exclusively based upon the maritime character of the cause of action asserted."

655 F. 2d at 645. Likewise, in *Baris*, the action was filed in state court pursuant to the savings to suitors clause but was removed to federal court. In addressing the plaintiff's savings to suitors argument, the court commented that because the plaintiff waived the right to his forum by failing to timely oppose removal, "such waiver carrie[d] with it the waiver of any rights or procedures peculiar to state court such as, *inter alia*, the right to a jury or to special time limits or discovery procedures under state law and state procedural rules."

Here the plaintiffs claims are governed by admiralty law because the situs and nexus tests are satisfied. The plaintiffs have failed to present anything to alter this Court's prior determination regarding the jurisdictional basis upon which the present case rests. The jurisprudence firmly establishes that neither OCSLA nor the savings to suitors clause guarantees the plaintiffs a jury trial. As a case that is solely cognizable in admiralty, the plaintiffs are not entitled to a jury. Accordingly,

IT IS ORDERED that Defendant Lloyd's Register of Shipping Motion to Strike Demand for a Jury Trial (Rec. Doc. No. 238) is **GRANTED.**

New Orleans, Louisiana, this 11th day of October, 2000.

s/ Ivan R. Lemelle
IVAN R. LEMELLE
UNITED STATES DISTRICT JUDGE